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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/038,675	12/31/2001	Mathew L. Koele	KCC 4772; K.C. No.16,738	9036
321	7590	09/09/2004	EXAMINER	
SENNIGER POWERS LEAVITT AND ROEDEL			KIDWELL, MICHELE M	
ONE METROPOLITAN SQUARE			ART UNIT	
16TH FLOOR			PAPER NUMBER	
ST LOUIS, MO 63102			3761	

DATE MAILED: 09/09/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No. 10/038,675	Applicant(s) KOELE ET AL.	
	Examiner Michele Kidwell	Art Unit 3761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 04 June 2004.
- 2a) ☐ This action is FINAL.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 36-54 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 36-54 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on June 4, 2004 has been entered.

### ***Response to Arguments***

Applicant's arguments with respect to claims 37 – 52 have been considered but are moot in view of the new ground(s) of rejection.

### ***Specification***

The amendment filed June 4, 2004 is objected to under 35 U.S.C. 132 because it introduces new matter into the disclosure. 35 U.S.C. 132 states that no amendment shall introduce new matter into the disclosure of the invention. The added material which is not supported by the original disclosure is as follows: the nonwoven loop material being substantially non-creped on the substrate and substantially free from discrete compression points other than said bond points.

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The examiner notes that any negative limitation or exclusionary proviso must have basis in the original disclosure. If alternative elements are positively recited in the specification, they may be explicitly excluded in the claims. See *In re Johnson*, 558 F.2d 1008, 1019, 194 USPQ 187, 196 (CCPA 1977) (“[the] specification, having described the whole, necessarily described the part remaining.”). See also *Ex parte Grasselli*, 231 USPQ 393 (Bd. App. 1983), *aff’d mem.*, 738 F.2d 453 (Fed. Cir. 1984). The mere absence of a positive recitation is not basis for an exclusion. See MPEP 2173.05(i). Applicant is required to cancel the new matter in the reply to this Office Action.

The specification is objected to as failing to provide proper antecedent basis for the claimed subject matter. See 37 CFR 1.75(d)(1) and MPEP § 608.01(o). Correction of the following is required: the specification does not support the terms “non-creped” or “discrete compression points”.

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 53 – 54 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

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The applicant claims that the nonwoven loop material is substantially non-creped (claim 53) and substantially free from discrete compression points other than at said bond points (claim 54). This language is not supported by the originally filed disclosure.

Claims 53 – 54 rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The applicant claims that the nonwoven loop material is substantially non-creped on the substrate and substantially free from discrete compression points. This language has not been defined nor supported by the originally filed disclosure. Therefore, it is unclear what the applicant intends to claim as an invention. What is encompassed by these terms? Clarification and/or correction are required.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 37 – 52 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jackson et al. (US 5,614,281).

The difference between Jackson and claim 36 is the provision that the first fastening component may be elongated about 100% in at least one direction.

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Jackson, through the incorporation of Giacobbe, discloses a fastening wherein stretchable loop fastener component can be elastically stretched at least about about 100% in at least one direction (see Table 2 of Giacobbe).

The applicant is reminded that "about" is a warning that exactitude is not claimed but rather a contemplated variation. *Kolene Corp. v. Motor City Metal Treating, Inc.* (CD Emech) 163 USPQ 291.

Further, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must result in a manipulative difference as compared to the prior art. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963).

With regard to claim 37, this claim is a product by process claim. See MPEP 2113. It is noted that it is the structure of the end product not the process of making the end product which determines patentability, i.e. claims would be unpatentable even if the prior art did not teach the same process of making as long as the prior art taught the same structure as that of the end product of such claimed process.

Jackson et al. (hereinafter "Jackson") discloses a mechanical fastening system for an article comprising a stretchable loop fastener component mountable on the article and comprising a laminate comprising an elastomeric substrate (col. 9, line 66 to col.

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10, line 4) and a high bond point nonwoven facing having greater than 225 bond points per square inch (col. 8, lines 1 – 12) joined to an elastic substrate (col. 9, line 66 to col. 10, line 4) and a hook fastener component mountable on the article and adapted for releasable engagement with the loop fastener component (figure 3) wherein the stretchable loop fastener component is stretchable relative to the hook fastener component when the fastener components are engaged during limited movement of the first fastening component relative to the second fastening component when the fastening components are engaged as set forth in figure 6.

The difference between Jackson and claim 1 is the provision that nonwoven facing has greater than 225 bond points per square inch.

It would have been obvious to one of ordinary skill in the art to modify the nonwoven facing of Jackson to provide a greater than 225 bond points per square inch because Jackson discloses the use of about 220 bond points per square inch and teaches that bond densities above the stated range may be used.

With respect to the stretching of the loop material, the examiner notes that the applicant attributes this limitation to position of the loop materials on the product. Specifically, the applicant positions the fastening components along the distal edges of the back side panels abutting or adjacent to the waist end edge [0078]. Jackson discloses the same positioning of the fastening component as set forth in figure 6. In view of this, it can be reasonably assumed that the identical positioning of the identical material of Jackson will ultimately yield a material that is stretchable during limited

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movement of the first fastening component relative to the second fastening component when the components are engaged as claimed by the applicant.

Lastly, Jackson incorporates Giacobbe (5453318) by reference to demonstrate suitable films for the support layer.

Giacobbe teaches an elastic layer as set forth in col. 1, lines 49 – 55; col. 3, lines 40 – 42; col. 12, lines 1 – 3.

With reference to claims 38 – 46 and 49 – 51, see col. 8, lines 1 – 4.

With respect to the differences in percentage and/or area, the examiner contends that it would have been obvious to one of ordinary skill in the art to provide the claimed values since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art.

The difference between Jackson and claims 48 – 49 is the provision that the material is mechanically prestrained or is neck-bonded.

This claim is a product by process claim. See MPEP 2113. It is noted that it is the structure of the end product not the process of making the end product which determines patentability, i.e. claims would be unpatentable even if the prior art did not teach the same process of making as long as the prior art taught the same structure as that of the end product of such claimed process.

As to claim 52, see the rejection of claim 37 and figure 6 of Jackson.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michele Kidwell whose telephone number is 703-305-2941. The examiner can normally be reached on Monday - Friday, 7:30am - 4:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Larry Schwartz can be reached on 703-308-1412. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Michele Kidwell  
Examiner  
Art Unit 3761